

In (Partial) Praise and Defense of Justice Engin Yildirim

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The Turkish Constitutional Court (the “Court”) is yet again front and center in Turkish politics – and yet again because a first instance criminal court [defied](#) its ruling. What is new this time is that a justice of the Court, [Engin Yildirim](#), chimed in, cleverly critiquing the defiant first instance criminal court – a move from an otherwise reticent institution that surprised lawyers, pundits, and politicians alike.

In [Kadri Enis Berberoglu \(2\)](#), the Court ruled that Mr. Berberoglu, a former journalist and current MP from the main opposition People’s Republican Party (tr. *Cumhuriyet Halk Partisi*), was unconstitutionally detained and denied his freedom, even after he was elected as MP for a second term, which, according to the Constitution, the Court ruled, granted him a renewed term of parliamentary immunity from being detained. Mr. Berberoglu was in prison for alleged crimes involving espionage, and most recently, the alleged crime of exposing government secrets to third parties, which he allegedly did when he wrote about a news story that accused the Turkish government of aiding “unsavory” rebel factions in Syria (whereas the Turkish government argues to this day that the military aid in question was being sent to Turkmen cities).

In its violation decision, the Court instructed the first instance criminal court to release Mr. Berberoglu, which the criminal court denied, arguing that the Constitutional Court had engaged in a kind of *ultra vires* review beyond its authority. A first instance criminal court, some of whose judges were appointed as late as 2016, telling Constitutional Court justices to mind their own business – welcome to Turkey, folks...

The Legal Controversy

To be sure, the criminal court and other higher courts that denied Mr. Berberoglu his freedom resorted to seemingly legal arguments. In a scandalous yet clear-cut move, the Turkish parliament (with support from the main opposition party, of which Mr. Berberoglu is a member – again, welcome to Turkey...) [added](#) a temporary article to the Constitution in 2016, which provided that parliamentary immunity would be waived for once *with regard to investigations against MPs that were ongoing at the time of the amendment’s passing in 2016*.

This temporary article has indeed been interpreted by courts, in my interpretation correctly (although that obviously says nothing about whether I thought it was politically desirable), as an exception to the general constitutional rule on parliamentary immunity enshrined in Article 83. However, that general rule also provides, in its fourth paragraph, that upon re-election, an MP’s parliamentary

immunity commences anew. In the Court's opinion, it was – I think correctly – held that the lower courts' very broad interpretation of the temporary exception to parliamentary immunity disregarded the rule about re-election: Mr. Berberoglu was re-elected in 2018, and that marks the commencement a new term of parliamentary immunity for him. The inferior courts – no doubt purposefully – overlooked this crucial fact.

The Political Controversy

The Constitutional Court decided this case sitting as a grand chamber and unanimously – a clear indication that it wanted to demonstrate the egregiousness of the violation as well as its firm stance against it. Sitting as a grand chamber no doubt also helps when the time comes to share the blame: that way, the government and some of the pseudo-journalist cadres operating at the government's discretion have a more difficult time pinpointing “enemies of the people”.

But that grand chamber ruling was easily flouted by a three-member, first-instance criminal court, one of whose members was a legal consultant to one of the ruling party-held municipal districts in Istanbul, prior to joining the judiciary – all enabled by the purge and the resulting vacancies in the courts following the July 15 coup attempt. A sobering evidence of the cure (i.e. the purges) being more fatal than the disease itself (i.e. the cadres once deeply rooted in the judiciary affiliated with what the government and judicial organs officially call the Fethullahist Terrorist Organization).

The criminal court and its three members, by disregarding a ruling of the highest court of the country, have, in my opinion, committed a serious judicial offense, which warrants prompt and commensurate disciplinary action, and possibly even a criminal investigation. If the criminal court and other sister courts to which Mr. Berberoglu's lawyers have filed their objections, persist in their defiance of the Constitutional Court, which remains to be seen, the crisis will deepen, with possible international reverberations: what would the European Court of Human Rights think, for example, of the effectiveness of an institution such as the Turkish Constitutional Court whose decisions can easily be nullified by inferior courts?

No doubt aware of this grim possibility among others, the Constitutional Court convened a closed extraordinary meeting shortly after the criminal court defied its ruling, which lasted around 3.5 hours.

Justice Engin Yildirim as the Scapegoat

Justice Engin Yildirim, an appointee of former president Abdullah Gul, whom I referred to as the “most liberal” member of the Court [elsewhere](#), [posted](#) a tweet from his now-private Twitter account. The tweet read “Lights are on” with a photo of the lighted Court building attached – a message that the Court was distressed by the lower court's defiance and was busy discussing what to do about it.

This was the second of Justice Yildirim's unusual tweets: only a few weeks prior to his tweet of the lighted Court building, he had subtly criticized Minister of Interior Suleyman Soyulu's rather vulgar "critique" of the Court's ruling that [invalidated](#) parts of a law that prohibited the exercise of the right to freely assemble in intercity highways. The Minister had openly attacked the Court and had addressed Chief Justice [Zuhtu Arslan](#) directly: "If we are a free country [...] try taking a bike ride to and from work, if you can! I'm addressing the President of the Court! I'm prepared to drive myself to work alone, what about you?!" His statements, typical of his populist, polemical, and heated tone, were met with a very guarded comeback from Chief Justice Zuhtu Arslan, who briefly [remarked](#) that Constitutional Court rulings were open to criticism, but that any criticism, to be productive, had to be based on an actual reading of the ruling, implying that the Minister probably had not even read the case he was attacking. Justice Engin Yildirim's comeback was even subtler: he [tweeted](#) Article 138 of the Constitution, without any commentary, which in relevant part provides: "No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions." He also tweeted two photos of him riding a bike, one from his university years back in 1992 and one from this year. "My bike adventure," the text of his brief tweet read.

Alas, when Justice Yildirim's tweet of the lighted Constitutional Court building was bombarded with allegations of coup-mongering (parking the question of how and why that association is even possible), his Court did not come to his aid. A curt statement recently [published](#) on the Court's website titled "Press Release" invokes the usual caveat that a member's social media presence does not bind the Court as an institution. But there is more in the statement: "The Constitutional Court, as it expressed in its press release on the night of July 15, 2016 [the coup attempt], rejects all anti-democratic interference with the constitutional order and stands by the democratic state governed by the rule of law."

This final sentence leaves Justice Engin Yildirim out in the open, as if his tweets are indeed calling for some kind of a coup... The Court's apologetic tone bespeaks a wider sentiment prevalent among Turkish institutions and even citizens, a kind of frenzy following the Gulenist coup attempt: a constant, almost ritualistic need to condemn coups, and to do so on every possible occasion to prove one's loyalty. As a token of this need, Justice Yildirim quickly lowered his tone, switched his Twitter account to private mode, and apologized for his tweets, saying they were misunderstood.

Why We Must Defend Justice Yildirim

Engin Yildirim is the bastion of progressivism on the Court, a *rara avis* given the current political climate. Below are snippets from some of the highlights of his career as justice:

- He wrote a lengthy dissent when a majority of the Court [declined](#) to invalidate the Turkish Civil Code article that made it obligatory for women to take the surnames of their husbands (currently, a woman in Turkey needs to go through

judicial and bureaucratic hurdles to not take her husband's surname). His decision began with a quote from Lucy Stone, a prominent American abolitionist and suffragist, and went on to discuss pertinent legal developments in Japan, the US, Switzerland and the European Court of Human Rights. He ended his dissent by invoking that this antiquated rule was an ancient relic of gender norms that conceived of women as "inbeccilitas [sic] sexus."

- He dissented from the judgment of the Court that [held](#) that Article 40 of the Turkish Civil Code was constitutional, which provides that transgender people must go through sex reassignment surgery for their sexual identity to be officially recognized. Decrying the obligation to go under surgery, his dissent, rich in comparative law references to UN resolutions, European Court of Human Rights jurisprudence, and to the legal framework applicable in countries as diverse as Indonesia, India, Germany, and Italy, concluded: "Transsexuals are not people with 'defected' bodies in need of correction by society or the state."
- He sided with the slim majority when the Constitutional Court [ruled](#) that the freedom of expression of the "Academics for Peace" was violated – a group of scholars that had called for an end to armed hostilities surrounding the Kurdish conflict concentrated in the southeastern part of the country.
- Apart from his judicial opinions, he is among the slim majority of justices on the Court who can read, write, and research in English. In 2016, for example, he co-authored an article titled "[Individual application to the Turkish Constitutional Court as a case of constitutional transfer](#)" (*Global Constitutionalism*, vol. 5, no. 2), which argues that Turkey's adoption of the individual application mechanism that enables individuals to seek redress from the Constitutional Court is more than a simple copy-and-paste legal transplant, with endogenous attributes.

Why Partially?

No one is flawless, but I still have a hard time understanding why Justice Yildirim signed on to the Court's ruling in 2016 that [rejected](#) a constitutional challenge against the provision of the Turkish Criminal Code criminalizing defaming the Turkish president – a piece of legislation that has grown into a useful political tool to suppress even the most "palatable" forms of dissent. The case is a low-point in the Court's jurisprudence and is conspicuously curt and unsophisticated in its reasoning – a sign of hesitation on the Court's part when politically sensitive cases are in question.

With that caveat, the smear campaign against Justice Yildirim is regrettable and something the Court, already politically captured, though not packed (as I make the case [here](#)), can hardly afford.

Ergo, I stand by Justice Engin Yildirim.

